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No. 08-765

Supreme Court, U.S.
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In the
Supreme Court of the United States

THE COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

JEREMY JAYNES,
Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Virginia

BRIEF OF THE STATES OF ALABAMA, COLORADO, FLORIDA, HAWAII, IDAHO, INDIANA, KENTUCKY, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When confronted with a claim that a state statute is substantially overbroad and, thus, facially unconstitutional, is a court required to compare the statute's constitutional applications to the statute's actual unconstitutional applications? *See* Pet. at i.

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INTEREST OF AMICI CURIAE[1]

Spam is a menace to the Nation's electronic communications networks. It accounts for over 80% of all e-mail traffic[2] and in any given year costs American businesses billions of dollars in network expenses and lost productivity.[3] States are not immune from this phenomenon – and in fact may be even more susceptible to it.[4] For that reason, the amici States eagerly support Virginia's request that this Court restore its common-sense anti-spam provision, Va. Code § 18.2-152.3:1.

But this case is about much more than unsolicited bulk e-mail. On a broader scale, it is about the cavalier *manner* in which the lower court tossed aside Virginia's anti-spam statute. From its unsupported assumption that the anonymous "Publius" would have run afoul of the statute were he to publish The Federalist Papers today via spam, the Virginia Supreme Court concluded that the

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[1] The parties' counsel of record received timely notice of the *amici curiae*'s intent to file this brief under Supreme Court Rule 37.2(a).

[2] *See* MessageLabs, *MessageLabs Intelligence: 2008 Annual Security Report* 5 (2008), http://www.messagelabs.com/mlireport/MLIReport_Annual_2008_FINAL.pdf (last visited Jan. 8, 2009).

[3] *See* S. Rep. No. 108-102, at 7 (2003).

[4] *See* Nat'l Assoc. of State Chief Info. Officers, *Welcome to the Jungle: The State Privacy Implications of Spam, Phishing and Spyware* 4 (2005), http://www.nascio.org/publications/documents/NASCIOSpamBriefWelcometotheJungle.pdf (noting that states' large number of e-mail addresses, consistent e-mail naming conventions, and Internet publication of employees' e-mail addresses make states "especially attractive spammer targets") (last visited Jan. 7, 2009).

amount of protected speech made criminal by the statute was "substantial" and invalidated the statute in its entirety. *See Jaynes v. Virginia*, 666 S.E.2d 303, 314 (Va. 2008). It did this without one shred of evidence about how often spam really is used to engage in political or religious speech, and even though Jaynes admitted that Virginia has every right to criminalize the particular conduct for which he was convicted. This case, then, is about a way of applying the First Amendment overbreadth doctrine that is itself overbroad.

States are interested for at least two reasons. First is their strong interest in ensuring that the enactments of their legislatures are not so casually discarded. Time and time again, this Court has emphasized the deference owed to these "embodiments" of the popular will. *E.g., Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008) (warning against short-circuiting "the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution"); *Almendarez-Torres v. United States*, 523 U.S. 224, 238, 118 S. Ct. 1219, 1228 (1998) (noting that the canon of avoiding constitutional doubt is followed "out of respect" for the legislative branch); *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205 (1975) (embracing the "proper—and properly limited—role of the courts in a democratic society"); *Barrows v. Jackson*, 346 U.S. 249, 256-57, 73 S. Ct. 1031, 1035 (1953) (expressing hesitance to "frustrate the expressed will of . . . the state legislatures"). Indeed, this deference helps explain why in more recent years this Court has "expressed increasing skepticism of facial challenges" like the one presented here. *Warshak v. United States*, 532

F.3d 521, 529 (6th Cir. 2008) (en banc). Invalidating a statute is serious business, and this Court should reserve a wide berth in its certiorari jurisdiction for reviewing such a result.

The amici States find a second and even stronger interest in avoiding the "substantial social costs," *Virginia v. Hicks*, 539 U.S. 113, 123 S. Ct. 2191, 2197 (2003), and "obvious harmful effects," *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008), created by the overbreadth doctrine when it justifies releasing criminals who cannot themselves claim any constitutional protection for their actions. When a state statute is invalidated on overbreadth grounds, those "social costs" are borne by the states, and the "obvious harmful effects" are felt in the states. And while today's freed criminal may be "only" an overly prolific e-mailer, tomorrow's may be a stalker, *e.g.*, *City of Montgomery v. Zgouvas*, 953 So. 2d 434 (Ala. Crim. App. 2006), a purveyor of terrorist threats, *e.g.*, *Lansdell v. State*, No. CR-05-0243, 2007 WL 2811969 (Ala. Crim. App. Sept. 28, 2007), or worse, *see, e.g.*, *United States v. Williams*, 444 F.3d 1286 (11th Cir. 2006), *rev'd*, *Williams*, 128 S. Ct. at 1847 (promoter of child pornography).

The states have a broad responsibility to protect the health, safety, and welfare of their citizens, and must legislate in an endless variety of areas that at least arguably implicate the First Amendment. When state statutes are judged by the courts for overbreadth, the State amici have an obvious interest in finding an overbreadth standard which is clear and which, except in the most extreme cases, will allow the constitutional portions of their statutes to be enforced.

REASONS FOR GRANTING THE WRIT

In barring all enforcement of a statute that maybe, arguably, perhaps prohibited some protected speech, the Virginia Supreme Court turned this Court's First Amendment overbreadth doctrine on its head. The court considered a statute that prohibited Jaynes from falsifying electronic information to avoid a protocol that blocked unsolicited e-mail. *Jaynes v. Virginia*, 666 S.E.2d 303, 305-06 (Va. 2008) (reprinted at Pet. App. 5). Jaynes conceded that there was no First Amendment problem with the statute as applied to his own conduct of flooding inboxes with unwanted *commercial* spam. *Id.* at 313 (App. 24, 40-41). However, the court held that the statute would be unconstitutional if it were applied to someone who, hypothetically, wished to falsify electronic information in order to trick computer servers into accepting spam with a political or religious message. *Id.* at 314 (App. 26-27). The court did so without any showing that such a person in fact exists and without any comparison of the statute's legitimate and (allegedly) illegitimate sweep. *Id.*

In section I, the amici States will argue that this case raises issues of national importance worthy of certiorari review: This Court's overbreadth cases recognize that importance of deferring to legislatures by reserving facial challenges to cases where the overbreadth is "substantial;" states are frequently required to defend statutes on overbreadth grounds; and spam itself is an important and costly national problem. In sections II and III, respectively, the amici States will argue that this Court should grant the petition because the Virginia Supreme Court failed to follow this Court's cases on an important issue and because the court's decision deepens a split in authority.

I. This Case Raises Issues of National Importance.

A. This Court's Overbreadth Doctrine Recognizes the Importance of Deferring to Legislatures By Reserving Facial Challenges to the Most Extreme Cases.

If a statute by its terms prohibits both unprotected speech and protected speech, it of course may be unconstitutional "as applied" to the person engaging in speech protected by the First Amendment. In a successful as-applied challenge, the law is declared unconstitutional in the circumstances of the case, and the legitimate reach of the statute remains intact. *See County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55, 99 S. Ct. 2213, 2223 (1979). However, if the reach into protected speech is great enough, the statute is facially invalid and may not be applied in any circumstances, even against someone whose First Amendment rights have not been violated. *See United States v. Williams*, 128 S. Ct. 1830, 1838 (2008).

While facial challenges based on overbreadth serve a purpose to protect the rights of persons not before the Court, there are significant costs to the "strong medicine" of invalidating a law in all applications. *New York v. Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 3361 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2108, 2916 (1973)). This Court has therefore limited facial challenges for overbreadth to those cases where the overbreadth is *substantial*:

> [T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all

> enforcement of that law – particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the "strong medicine" of overbreadth invalidation.

Virginia v. Hicks, 539 U.S. 113, 119-120, 123 S. Ct. 2191, 2197 (2003) (quoting *Broadrick*, 413 U.S. at 613, 615, 93 S. Ct. at 2916-17). *See also Osborne v. Ohio*, 495 U.S. 103, 112, 110 S. Ct. 1691, 1697 (1990) ("Even where a statute at its margins infringes on protected expression, facial invalidation is inappropriate if the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct." (citations and internal quotation marks omitted)).

The importance of this issue – the proper test for substantial overbreadth – is shown by this Court's own recognition of the "substantial social costs," *Hicks*, 539 U.S. at 119, 123 S. Ct. at 2197, and "obvious harmful effects," *Williams*, 128 S. Ct. at 1838, created when a statute with at least some lawful applications is struck down in full because it also has some unlawful applications. It is thus

important that the overbreadth standard ensures that facial challenges are reserved for appropriate cases.

"[T]he First Amendment needs breathing space," *Broadrick*, 413 U.S. at 611-12, 93 S. Ct. at 2915, but so do state legislatures. State statutes cannot withstand an overbreadth test that requires perfect alignment with the First Amendment (in all real *and* imaginary circumstances) before it can be enforced in any application. Wherever possible, overbreadth should be cured by as-applied challenges, so that necessary laws are not invalidated in full. Because of the deference owed to legislatures and the significant costs of the overbreadth doctrine, the test for whether to invalidate a state statue is always one of national importance.

B. Overbreadth Challenges Are Made With Ever-Increasing Frequency To An Ever-Increasing Range of Laws.

It is important that the overbreadth doctrine be limited, because overbreadth *challenges* seem to have no limit. Overbreadth has become a stock defense in criminal cases. Unlike statutes that deal with pornography, nude dancing and outdoor signs, and which constantly are being challenged as overbroad, some categories of laws seem at first blush not to lend themselves to such a challenge. However, new means and opportunities of expression, coupled with the ingenuity of defendants to tie criminal statutes to some type of speech, force states to defend overbreadth challenges with growing frequency.

A case in point is Delaware's very sensible statute prohibiting patient abuse, Del. Code tit. 16, § 1136(a). Because that statue reaches emotional and verbal abuse, it is ripe for an overbreadth challenge

in today's environment. In one prosecution, a defendant charged under the statute engaged in deplorable physical abuse of a patient. The statute was clearly constitutional as applied to her, yet she argued that the entire statute should be invalidated because it might cover some protected speech. *Robinson v. State*, 600 A.2d 356, 362 (Del. 1991). Fortunately, the court applied this Court's precedents correctly, held that the statute did not prohibit a *substantial* amount of protected speech, and left intact the lawful applications of the statute. *Id.* at 364. Had the court used the test that was applied to the Virginia anti-spam statute, the outcome is not so certain.[5]

Countless other state statutes and ordinances have been challenged on overbreadth grounds in recent years. That many of the challenges have been unsuccessful (so far) is beside the point: With a firm overbreadth test, states have little to fear from fringe overbreadth challenges, and legislatures are kept in check by as-applied challenges. With an eroded test, however, where a "fanciful hypothetical" is sufficient to invalidate a law, *Williams*, 128 S. Ct. at 1843, virtually any state statute is vulnerable.

As shown below, practically any state or local law can be challenged on overbreadth grounds, even those laws without an obvious connection to speech. The following list of statutes that have faced recent

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[5] In its petition, Virginia discusses other recent overbreadth challenges to state statutes and focuses on those where courts use a weakened overbreadth standard, driven by hypotheticals, similar to that used by the Supreme Court of Virginia. Pet. at 26-27. The amici States note that none of those statutes survived the weakened test.

overbreadth challenges demonstrates the depth of the problem for the States:

- **Aiding a minor in obtaining abortion without parental consent.** *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 741-42 (Mo. 2007) (upheld on limiting construction).
- **Bomb Scares.** *In re Robert T.*, 746 N.W.2d 564, 568 (Wis. Ct. App. 2008) (upheld).
- **Campaign finance disclosures.** *Colorado Right to Life Comm., Inc. v. Davidson*, 395 F. Supp. 2d 1001, 1016 (D. Colo. 2005) (rejecting overbreadth argument), *aff'd sub nom. Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137 (10th Cir. 2007).
- **Campaigning at voting sites.** *Anderson v. Spear*, 356 F.3d 651, 661 (6th Cir. 2004) (striking 500-foot no-campaign zone as overbroad).
- **Child endangerment (failing to report abuse).** *State v. Wilson*, 987 P.2d 1060, 1067 (Kan. 1999) (upheld).
- **Communications fraud.** *State v. Mattinson*, 152 P.3d 300, 303 (Utah 2007) (upheld).
- **Conflict of interest by public officials.** *Commonwealth v. Habay*, 934 A.2d 732, 739 (Pa. Super. Ct. 2007) (upheld), *appeal denied*, 954 A.2d 575 (Pa. 2008).
- **Criminal transmission of HIV.** *State v. Musser*, 721 N.W.2d 734, 746 (Iowa 2006) (upheld).
- **Disorderly conduct on Capitol grounds** (to intentionally interfere with Congress). *Smith-Caronia v. United States*, 714 A.2d 764, 767 (D.C. 1998) (upheld).

- **Drug-induced homicide.** *People v. Boand*, 838 N.E.2d 367, 398-99 (Ill. App. Ct. 2005) (upheld).
- **Driving under the influence.** *State v. Poshka*, 109 P.3d 113, 116 (Ariz. Ct. App. 2005) (upheld). *See also State v. Andrews*, 730 N.W.2d 416, 419-20 (S.D. 2007) (rejecting an overbreadth challenge to a statute proscribing *boating* under the influence).
- **English-only Requirement for State Business.** *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 214 n.194 (Alaska 2007) (overbreadth challenge rejected). *Cf. id.* at 215 (Bryner, C.J., dissenting) (arguing that the statute should have been struck down as overbroad).
- **Extortion.** *Pauling v. McKenna*, No. C04-2203C, 2005 WL 3132213, at *4 (W.D. Wash. Nov. 22, 2005) (unreported) (statute upheld); *People v. Feldman*, 791 N.Y.S.2d 361, 382-83 (N.Y. Sup. Ct. 2005) (upheld).
- **Failing to obey a police officer.** *Commonwealth v. Abramms*, 849 N.E.2d 867, 876-77 (Mass. App. Ct. 2006) (upheld on limiting construction). *Cf. id.* at 880 (Berry, J., dissenting) (arguing that the statute should have been struck down as overbroad); *State v. Illig-Renn*, 142 P.3d 62, 69 (Or. 2006) (upheld); *State v. Kaiser*, 65 P.3d 463, 468 (Ariz. Ct. App. 2003) (upheld).
- **Harboring a dangerous dog.** *McNeely v. United States*, 874 A.2d 371, 380-81 (D.C. 2005) (upheld).
- **Identity theft.** *State v. Porter*, 108 P.3d 107, 111 (Or. Ct. App. 2005) (upheld on limiting construction).

- **Improper recruiting of high school athletes by college coach.** *Rottmann v. Pennsylvania Interscholastic Athletic Ass'n*, 349 F. Supp. 2d 922, 933 (W.D. Pa. 2004) (agency rule not overbroad because "[t]here are a substantial number of ways that the Rule can be validly applied.")
- **Intentionally causing another to make false statements when collecting signatures on a petition.** *Dermer v. Miami-Dade County*, No. 07-21308-CIV, 2008 WL 2955152 (S.D. Fla. Aug. 1, 2008) (struck as overbroad).
- **Jury tampering.** *Turney v. State*, 936 P.2d 533, 541 (Alaska 1997) (upheld on limiting construction).
- **Methamphetamine production.** *Varble v. Commonwealth*, 125 S.W.3d 246, 256 (Ky. 2004) (upheld); *People v. Bradford*, No. No. 273540, 2007 WL 4355426, at *7 (Mich. Ct. App. Dec. 13, 2007) (unreported) (statute upheld); *State v. Kouns*, No. M2006-02788-CCA-R3-CD, 2008 WL 4830793, at *9 (Tenn. Crim. App. Nov. 5, 2008) (statute upheld).
- **Mob action statute** (prohibiting assembly of two or more to do an unlawful act). *People v. Williams*, 838 N.E.2d 275, 281 (Ill. App. Ct. 2005) (citing *Landry v. Daley*, 280 F. Supp. 2d 938 (N.D. Ill. 1968), *rev'd on other grounds sub nom. Boyle v. Landry*, 401 U.S. 77, 91 S. Ct. 758 (1971)) (affirming dismissal of complaint when state was subject to federal court injunction against enforcing statute on grounds that it was overbroad).

- **Municipal employee campaigning for municipal office.** *DeAscentis v. Pine*, 729 A.2d 715, 717-18 (R.I. 1999) (action dismissed as moot).
- **Open Meetings.** *Rangra v. Brown*, No. P-05-CV-075, 2006 WL 3327634, at *7 (W.D. Tex. Nov. 7, 2006) (statute upheld).
- **Panhandling (aggressive).** *People v. Barton*, 861 N.E.2d 75, 75-76 (N.Y. 2006) (upheld).
- **Police officer associating with felons.** *Bailey v. City of National City*, 226 Cal. App. 3d 1319, 1332-33 (Cal. Ct. App. 1991) (dismissed on standing grounds).
- **Promoting prostitution.** *Allen v. Stratton*, 428 F. Supp. 2d 1064, 1071-72 (C.D. Cal. 2006) (California statute upheld); *People v. Levels*, No. F052369, 2008 WL 2486866, at *10 (Cal. Ct. App. June 23, 2008) (unreported) (claim rejected for lack of standing); *State v. Pegouskie*, 113 P.3d 811, 820 (Haw. Ct. App. 2005) (upheld); *State v. Wong*, No. M2003-00504-CCA-R3-CD, 2004 WL 1434384, at *13 (Tenn. Crim. App. June 25, 2004) (unreported) (statute upheld).
- **Protesting at burial services or funeral processions during military funerals.** *Phelps-Roper v. Taft*, 523 F. Supp. 2d 612, 620 (N.D. Ohio 2007) ("floating buffer zone" provision struck as overbroad and severed), *aff'd in part sub nom. Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008) (no cross-appeal of overbreadth ruling); *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 997 (E.D. Ky. 2006) (300-foot buffer between protesters and bereaved family members of deceased soldiers held overbroad).
- **State employees using public resources for political purposes.** *Siplin v. State*, 972 So. 2d

982, 989-90 (Fla. 5th Dist. Ct. App. 2007) (upheld on limiting construction); *Herbert v. Washington State Pub. Disclosure Comm'n*, 148 P.3d 1102, 1111-12 (Wash. Ct. App. 2006) (upheld).

- **Sexual misconduct/abuse of trust.** *People v. Bayer*, 756 N.W.2d 242, 250-53 (Mich. Ct. App. 2008) (sexual relations between psychiatrist and patient) (statute upheld), *vac. in part on other grounds*, 756 N.W.2d 77 (Mich. 2008); *State v. McKenzie-Adams*, 915 A.2d 822, 833 n.10 (Conn. 2007) (sexual relations between school employees and students) (statute upheld), *cert. denied*, 128 S. Ct. 248 (U.S. 2007); *State v. Bussmann*, 741 N.W.2d 79, 84 n.2 (Minn. 2007) (sexual misconduct by member of the clergy) (facial challenge rejected).
- **Telephone harassment.** *Vines v. City of New York*, 305 F. Supp. 2d 289, 300-02 (S.D.N.Y. 2003) (struck as overbroad), *rev'd in part on other grounds*, 405 F.3d 115 (2d Cir. 2005). *But see People v. Cooper*, 781 N.Y.S.2d 201 (N.Y. Dist. Ct. 2004) (refusing to follow *Vines* and holding that statute was not unconstitutional).
- **Telephone Solicitations** ("No-call" lists). *Nat'l Coal. of Prayer, Inc. v. Carter*, No. 02-0536-C B/S, 2005 WL 2253601, at *4-*5 (S.D. Ind. Sept. 2, 2005) (unreported) (statute upheld), *aff'd*, 455 F.3d 783 (7th Cir. 2006).
- **Terrorist threats.** *Lansdell v. State*, No. CR-05-0243, 2007 WL 2811969, at *3 (Ala. Crim. App. Sept. 28, 2007) (upheld).
- **Theft by Deception.** *State v. Trackwell*, No. A-01-1174, 2003 WL 22231883, at *2 (Neb. Ct. App. Sept. 30, 2003) (unreported) (claim of overbreadth not reached on appeal).

- **Unauthorized practice of medicine.** *People v. Rogers*, 641 N.W.2d 595, 610 (Mich. Ct. App. 2001) (upheld); *State v. Hoffman*, 733 P.2d 502, 505-06 (Utah 1987) (upheld). *See also State v. Wees*, 58 P.3d 103, 107 (Idaho Ct. App. 2002) (statute prohibiting the unauthorized practice of law upheld because it "plainly encompasses a wide range of constitutionally proscribable conduct.").
- **Witness tampering.** *People v. Butler*, 873 N.E.2d 480, 483-84 (Ill. App. Ct. 2007) (upheld), *appeal denied*, 879 N.E.2d 933 (Ill. 2007); *People v. Bennett-Gibson*, 851 A.2d 1214, 1224 (Conn. App. Ct. 2004) (upheld).
- **Workers' Compensation fraud.** *Tauese v. Hawaii Dep't of Labor & Indus. Relations*, 147 P.3d 785, 812 n.27 (Haw. 2006) (upheld).

States are constantly required to defend statutes, of all varieties, against claims that a hypothetical person will be chilled by the statute's allegedly impermissible reach. It is a matter of national importance, then, that the test for substantial overbreadth be clear and that, except in the most extreme cases, the constitutional portions of the statute remain in effect.

C. Spam is a Costly National Problem Requiring Regulation by the States, and Spam Violates the Sanctity of the Home.

Any e-mail user is woefully familiar with spam. As observed in the first paragraph of this brief, some reports estimate that more than 80% of all e-mail is spam. Other estimates are even higher:

> By June 2008, research reveals that the level of spam had risen to 96.5% of all business e-

> mail. Having risen from a figure of 92.3% in the first three months of the year, corporations are now facing the fact that only one in 28 e-mails is legitimate.

Press Release, Sophos Inc., Sophos Report Reveals Rising Tide Of Spam In April-June 2008 (July 15, 2008), http://www.sophos.com/pressoffice/news/articles/2008/07/dirtydozjul08.html (last visited Jan. 8, 2009).[6]

Unlike other forms of unsolicited speech such as junk mail, where the *sender* bears the costs, the cost of spam is largely borne by the recipient. Internet service providers (ISP's) work to block most spam, the cost of which is passed on to users, and there is productivity cost in deleting unwanted spam and searching for legitimate e-mails in the ocean of the unwanted.[7] For 2007, one group estimates the cost of spam world-wide to be $100 billion, "of which $35

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[6] One group estimates that users world-wide send 210 billion e-mails per day. Press Release, The Radicati Group, Inc., The Radicati Group, Inc., Releases Q2 2008 Market Numbers Update (August 4, 2008), http://www.radicati.com/?p=638 (last visited Jan. 6, 2009). Assuming (conservatively) that 85% of those e-mails are spam, spam is sent at a rate of 123,958,333 unsolicited e-mails *per minute*.

[7] In passing the CAN-SPAM Act, Congress found that "[t]he receipt of unsolicited commercial electronic mail may result in costs to recipients who cannot refuse to accept such mail and who incur costs for the storage of such mail, or for the time spent accessing, reviewing, and discarding such mail, or for both." CAN-SPAM Act of 2003, § 2, 15 U.S.C. § 7701(3). The California Legislature likewise found that "[t]he 'cost shifting' from deceptive spammers to Internet business and e-mail users has been likened to sending junk mail with postage due or making telemarketing calls to someone's pay-per minute cellular phone." Cal. Bus. & Prof. Code § 17529(h).

billion [was borne] in the USA alone." Ferris Research, Industry Statistics, http://www.ferris.com/research-library/industry-statistics/ (last visited Jan. 8, 2009).

As Virginia points out in its petition, many states have legislation addressing the problem of spam, with some statutes targeting commercial spam only and some targeting *all* unsolicited e-mail. Pet. at 28-29. The amici States note further that several States, whether addressing all spam or just commercial spam, have statutes that focus on the same problem the Virginia General Assembly tried to address here: spammers falsifying their electronic "signatures" in order to deceive an ISP's spam filters. One example is Connecticut's statute, which makes it illegal to

> [f]alsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers.

Conn. Gen. Stat. § 53-451(b)(7). Similar statutes include Colo. Rev. Stat. § 6-1-702.5; Del. Code Ann. tit. 11, § 937; 720 Ill. Comp. Stat. 5/16D-3; Iowa Code § 716A.2(1)(a); N.C. Gen. Stat. § 14-458(a); Ohio Rev. Code Ann. § 1307.64(H); 18 Pa. Cons. Stat. Ann. § 7661(a)(1); R.I. Gen. Laws §11-52-4.1(a)(7); and Tenn. Code Ann. § 39-14-603(a). The number of states addressing the issue is evidence that the problem is a national one meriting review by this Court.

The distinction drawn by the Virginia Supreme Court – that the statute in question prohibited *all*

falsified spam, and not just falsified *commercial* spam – does nothing to lessen the issue's importance. That distinction evaporates when the question is one of speech forced upon its audience: "[N]o one has a right to press even 'good' ideas on an unwilling recipient." *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738, 90 S. Ct. 1484, 1491 (1970). Plus, even if commercial speech does not enjoy quite the protection of noncommercial speech, commercial speech is not wholly unprotected. Even statutes targeting only commercial e-mails are vulnerable to an overbreadth challenge.

This Court has recognized that the First Amendment permits laws that limit "forced" speech, whether or not the speech is commercial. In *Rowan*, this Court approved a statute allowing mail customers to opt out of receiving junk mail. *Id.* As one Justice noted, the Court's interpretation of the statute was broad enough to apply to "political, religious, or other materials." *Id.* at 741, 90 S. Ct. at 1493 (Brennan, J., concurring). Unwanted speech, commercial or not, can be regulated to a greater extent than the same speech in a voluntary environment:

> One important aspect of residential privacy is protection of the unwilling listener. . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the state may legislate to protect, is an ability to avoid intrusions. Thus we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Frisby v. Shultz, 487 U.S. 474, 484-85, 108 S. Ct. 2495, 2502 (1988) (citations omitted).

Even if a person can check his e-mail from any computer, an e-mail account is personal space, like the home, and states can legislate to protect it. The First Amendment allows statutes that prohibit a company from sending unwanted text messages to a cell phone. *E.g., Joffe v. Acacia Mortgage Corp.*, 121 P.3d 831, 842-43 (Ariz. Ct. App. 2005) (considering the Telephone Consumer Protection Act, 47 U.S.C. § 227). It allows statutes that prohibit unsolicited advertising facsimiles. *Kaufman v. ACS Sys., Inc.*, 2 Cal. Rptr. 3d 296, 323-24 (Cal. Ct. App. 2003). It allows enforcement of a "do-not-call" list, even to third-party fundraisers calling on behalf of tax-exempt charities. *Nat'l Coal. of Prayer v. Carter*, 455 F.3d 783, 792 (7th Cir. 2006). In the same manner, it allows a statute that prohibits a person from falsifying his identity to send an unwanted e-mail, whether he is stuffing in-boxes with advertisements or, assuming this is actually occurring, with political or religious views. To argue to the contrary is akin to arguing that a person has a First Amendment right to bring his soap box or pulpit into another's living room, and to do so under false pretenses.[8]

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[8] Even if there is a First Amendment right to lie about your identity in order to send an unwanted political or religious e-mail, that is only part of the analysis. There is still the question of whether such "protected" speech is substantial in relation to the *unprotected* speech, such as Jaynes', that is covered by the statute. *Hicks*, 539 U.S. 113 at 119-120, 123 S. Ct. at 2197; *Broadrick*, 413 U.S. at 613-15, 93 S. Ct. at 2917-18. That is a question the Virginia Supreme Court failed to ask.

II. The Virginia Supreme Court's Decision Contradicts This Court's Test For Determining Substantial Overbreadth.

A hypothetical political spammer was enough, in the Virginia Supreme Court's view, to show that the statute was "substantially overbroad" and to invalidate the statute in *all* applications. However, that is not enough under this Court's decisions to make a successful facial challenge. This Court should grant the petition to reinstate a state statute that is constitutional in at least the great majority of applications, and to strengthen an overbreadth test that will be applied over and over again as more state statutes are challenged as overbroad.

Admittedly, a notion such as substantial overbreadth "is not readily reduced to an exact definition." *Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 800, 104 S. Ct. 2118, 2126 (1984). This Court has given guidance, though, making clear that the abbreviated analysis used by the Virginia Supreme Court is insufficient: "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Id.* Rather, "there must be a *realistic* danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id.* at 801, 104 S. Ct. at 2126 (emphasis added).

Thus, in *Virginia v. Hicks*, it was not enough for Hicks to show that a trespass policy may possibly have some impermissible application. Hicks bore the "burden of demonstrating, 'from the text of [the law] *and from actual fact*,' that substantial overbreadth

exist[ed]." *Hicks*, 539 U.S. at 122, 123 S. Ct. at 2198 (quoting *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14, 108 S. Ct. 2225, 2234 (1988)) (emphasis added). Hicks lost, not because he failed to devise a hypothetical or two, but because he "failed to demonstrate that [a 'no-return'] notice would even be given to anyone engaged in constitutionally protected speech." *Id.* Moreover, within the law's legitimate reach, it applied to "a group that would seemingly far outnumber First Amendment speakers." *Id.* at 123, 123 S. Ct. at 2199.

The Virginia Supreme Court did not hold Jaynes to the same standard this Court required of Hicks. The court concluded that "were the *Federalist Papers* just being published today via e-mail, that transmission by Publius would violate the statute." 666 S.E.2d at 314. Claiming this was not a "fanciful hypothetical," *id.* (quoting *Williams*, 128 S. Ct. at 1843), the court invalidated the statute in all applications.

The amici States do not concede that the Virginia statute is unconstitutional as applied to the hypothetical political or religious spammer. Such a person, after all, must have falsified his electronic identification to fall within the statute's reach, so what is prohibited is not the message but a dishonest transmission of the message. *See Williams*, 128 S. Ct. at 1842 (holding that a pandering provision was not unconstitutionally overbroad when it did not, in fact, bar protected speech). The Virginia statute does not apply to Alexander Hamilton publishing under the "Publius" pseudonym; it applies to Alexander Hamilton falsely claiming to be Patrick Henry. To give legitimacy to the hypothetical assumes, moreover, that there is any merit at all to

the notion of spammers using falsified unsolicited e-mails to do anything except to sell goods or push fraudulent schemes, or that in-boxes are being clogged with political discourse alongside the offers for miracle drugs and penny-stock tips.[9]

Be that as it may, and even assuming that the statute bars some protected speech, it does not follow that the statute is facially invalid. The critical flaw in the Virginia Supreme Court's reasoning is in what it did *not* ask: How much protected speech is proscribed, as compared to unprotected speech? Are there really would-be political spammers? If there is such a thing as religious or political spam, is its volume substantial as compared to the billions of "commercial" spam sent every hour? The answers to these questions would have required that the statute be upheld and that Jaynes' conviction be affirmed. Ignoring these questions led the court to wipe off the books a statute with an indisputably legitimate reach – one the people's representatives enacted to address real societal problems.

A test for overbreadth limited only by the imagination of lawyers and judges is no test at all.

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[9] Indeed, it is difficult to imagine something as important as The Federalist Papers being published by bulk e-mail, competing for attention with the vulgar messages of conventional spam. Obviously, there was nothing like e-mail in the Eighteenth Century, but the methods used then – the tried-and-true pamphlet and letter to the editor – are still available today. Moreover, those wishing to take advantage of modern technology can (and do) publish anonymously via web sites, blogs, message boards, *legally*-transmitted e-mails, and other internet platforms. To be blunt, reversing the Virginia Supreme Court here, and allowing states to prohibit falsifying one's identity to send spam, is unlikely to hinder the next revolution.

Just as "[i]t will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question,'" *Grayned v. City of Rockford*, 408 U.S. 104, 111 n.15, 92 S. Ct. 2294, 2301 n.15 (1972), a "fertile legal imagination" can always come up with some way that a statute impacts protected speech.

III. The Virginia Supreme Court's Decision Deepens a Conflict of Authority.

Finally, the amici States agree that there is a conflict of authority among the lower appellate courts concerning the proper application of the test for substantial overbreadth.

The amici States add only that while this Court's decisions on overbreadth have been clear, further clarification is needed with respect to what overbreadth is "substantial." We favor an approach that is more objective, such as that used by the Third Circuit. That Court measures "(1) the number of valid applications, (2) the historic or likely frequency of conceivably impermissible applications, (3) the nature of the activity or conduct sought to be regulated, and (4) the nature of the state interest underlying the regulation." *Borden v. Sch. Dist.*, 523 F.3d 153, 165 (3rd Cir. 2008) (quotation marks and citation omitted).

If this Court was to endorse a test such as that used by the Third Circuit, it would resolve the current split between that court (and others with similar tests) and those that measure "substantial overbreadth" by simply considering whether there is a conceivable impermissible application. If this Court was to endorse such a test, there would be little danger that the amici States' statutes would be

invalidated in their entirety simply because a judge or lawyer thought up a "fanciful hypothetical."

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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